89-632

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GK TRUCKING CORP.,
THE PENN CENTRAL CORPORATION,
GK TECHNOLOGIES INCORPORATED,
including its division
GENERAL CABLE COMPANY
and ROBERT JENSEN,
Petitioners,

vs.

FRANCIS L. LACINA, DAVID D. GALBRAITH,
BILLY L. KNIGHT, MRS. JO ANN CRAIG,
TED T. EDWARDS, CHARLES F. BEESON,
DONALD EVANS, LOUIS E. RESINGER,
ANDREW H. RODGERS, DAN KELLY,
MARVIN GATES, WILBURT BOND,
BILL GONZALES, LES DIXON,
FRANK L. MATNEY and MRS. RITA BERNAS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a "hybrid" claim for breach of duty of fair representation/breach of collective bargaining agreement accrue when an employee knew or should have known that the union was not going to take any action on his behalf or at some later time when the union "formally" announces its position.

2. Does an inadvertent, unintentional attempt to file a complaint, which is rejected by the clerk and never resubmitted in that form, constitute a filing for purposes of Rules 3 and 5(e), Fed. R. Civ. P.

LIST OF PARTIES

The parties to this proceeding below were the respondents, Francis L. Lacina, David D. Galbraith, Billy L. Knight, Mrs. Jo Ann Craig, Ted T. Edwards, Charles F. Beeson, Donald Evans, Louis E. Resinger, Andrew H. Rodgers, Dan Kelly, Marvin Gates, Wilburt Bond, Bill Gonzales, Les Dixon, Frank L. Matney and Mrs. Rita Bernas, and the petitioners GK Trucking Corp., The Penn Central Corporation, GK Technologies Incorporated, including its division General Cable Company, and Robert Jensen. Pursuant to Rule 28 of the Rules of this Court, the only parent company, subsidiary (except wholly owned subsidiaries) or affiliate of the corporate petitioners is The Penn Central Corporation.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

GK TRUCKING CORP.,
THE PENN CENTRAL CORPORATION,
GK TECHNOLOGIES INCORPORATED,
including its division
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and ROBERT JENSEN,
Petitioners,

vs.

FRANCIS L. LACINA, DAVID D. GALBRAITH,
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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners GK Trucking Corp., The Penn Central Corporation, GK Technologies Incorporated, including its division General Cable Company, and Robert Jensen respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on April 25, 1989, as amended July 17, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 877 F.2d 741 and is reprinted in the Appendix hereto. *See infra* pp. A1-A13. The Amended Supplemental Statement of Uncontroverted Facts and Conclusions of Law Regarding Defendants' Motion for Summary Judgment, filed April 4, 1988 ("1988 Findings And Conclusions"), the Proposed Statement Of Uncontroverted Facts and Conclusions Of Law, filed February 25, 1985 ("1985 Findings And Conclusions") (which were incorporated in the 1988 Findings And Conclusions), and the Summary Judgment, entered April 6, 1988, of the District Court for the Central District of California (Ideman, J.), which are unreported, are printed in the appendix hereto. *See infra* pp. B1-B6, C1-C8, and D1-D2.

This Court has already granted a petition for writ of certiorari in this case. *Lacina v. G-K Trucking*, 483 U.S. 1002 (1987), *vacating* 802 F.2d 1190 (9th Cir. 1986) (*infra* pp. E1-E8), at which time the judgment below was vacated and the case remanded for further consideration in light of *West v. Conrail*, 481 U.S. 35 (1987).

JURISDICTION

Respondents invoked the jurisdiction of the District Court for the Central District of California pursuant to the Labor-Management Relations Act, 1947, Tit. III, § 301, 29 U.S.C. § 185 (1982). After the district court entered summary judgment for petitioners, a timely appeal to the Court of Appeals for the Ninth Circuit was taken. Thereafter the Court of Appeals rendered its original opinion and judgment on October 21, 1986 and amended its opinion on December 30, 1986 (Kennedy, Beezer and Hall, JJ.). 802 F.2d 1190 (*infra* pp. E1-E8).

A timely petition for rehearing and suggestion for rehearing en banc was denied on January 26, 1987, and a timely petition for certiorari was filed April 23, 1987. This Court granted the petition, vacated the judgment and remanded the matter to the Court of Appeals, which in turn vacated its judgment and remanded the case to the district court on July 15, 1987. 822 F.2d 51. The district court entered summary judgment and made findings supplemental to its prior findings and conclusions, and a timely appeal was taken again to the Court of Appeals for the Ninth Circuit.

The Court of Appeals rendered its opinion and judgment on April 25, 1989 and amended its opinion on July 17, 1989 (Schroeder, Fletcher and Trott, JJ.). App., A1-A6 and A7-A13, 877 F.2d 741 (1989). A timely petition for rehearing was denied on July 17, 1989.

This petition has been filed within ninety days of the denial of the petition for rehearing and is, therefore, timely pursuant to 28 U.S.C. § 2101(c) (1982) and Sup. Ct. R. 20.4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTE AND RULES INVOLVED

29 U.S.C. § 185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 3, Fed. R. Civ. P. Commencement of Action.

A civil action is commenced by filing a complaint with a court.

Rule 5(e) Fed. R. Civ. P. Service and Filing of Pleadings and Other Papers.

(e) *Filing with the Court Defined.* The filings of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.

STATEMENT OF THE CASE

This action has had a long and tangled procedural history including a prior grant of a petition for writ of certiorari by this Court. The action was initiated by 18 former employees of petitioner GK Trucking against their employer and affiliated corporate entities and a corporate officer. Respondents are 14 of the 18 original plaintiffs and two spouses who substituted in as representatives of the estates of two deceased plaintiffs. In 1979, GK Trucking and the employees' exclusive collective bargaining representative, International Brotherhood of Teamsters Union, Local 224 ("Union") made a three year collective bargaining agreement extending to June 30, 1982, governing the terms of employment of GK Trucking's employees (including the plaintiffs) at the Montebello, California terminal. The contract consisted of the National Master Freight Agreement, the Western States Area Over The Road Supplement Agreement and an August 1979 rider.

In February 1981 GK Trucking entered into a "concessions rider" with the Union pursuant to which the Union agreed to various concessions in an effort to keep the employer competitive and also agreed to enter into a second rider, the "System 99 rider," to allow GK Trucking to open a second West Coast terminal to handle

different freight. The parties hereto dispute the meaning and interpretation of the concessions rider and the System 99 rider and, particularly, the effect of such riders on the expiration date of the underlying collective bargaining agreement to which they were appended.

In October and November of 1981, GK Trucking was constrained to lay off 10 drivers, 5 of whom are plaintiffs in this case, as a result of reduction in work. In late March 1982, in contemplation of the upcoming June 30 expiration of the overall collective bargaining agreement and in the face of continuing competitive pressures on GK Trucking, GK Trucking and the Union negotiated an entirely new labor agreement to replace the expiring National Master Freight Agreement. This agreement was put to a vote by GK Trucking's drivers and rejected. Soon after the rejection of the new labor agreement, GK Trucking announced on or about April 1, 1982 that it was going out of business, closing the Montebello terminal and laying off all employees permanently. The Montebello terminal was closed April 16, 1982, and all of the drivers, including all 18 plaintiffs herein, were laid off permanently. When defendants' motion for summary judgment was initially heard in 1985, the district court (Ideman, J.) found:

> as of April 1982, most, if not all, of the plaintiffs believed that the Union was not going to take any action, including filing a grievance, regarding the closing of the Montebello terminal and their permanent lay-offs. Further, as of this month, most, if not all, of the plaintiffs believed that the Union was not representing them fairly.

App., C4. A month *after* the terminal actually closed, the Union and GK Trucking held a "Change Of Operations" hearing on May 17, 1982 in San Diego pursuant to Article 8, § 6 of the National Master Freight Agreement.

No one ever filed a grievance regarding the closing of the Montebello terminal and the permanent lay off of the GK Trucking drivers in April 1982.

On November 10, 1982 a law clerk for plaintiffs' counsel made a mistaken and unauthorized attempt to file a complaint, which was rejected by the clerk's office for technical defects. Thereafter, as respondents herein have told this and other courts in various prior filings, they "filed their complaint initiating this action on December 3, 1982." Petition for Writ of Certiorari of Francis Lacina, et al., dated April 23, 1987 at 5. After some discovery had been had, the district court entered summary judgment for petitioners herein, App., C1. This court found the matter barred by the statute of limitations, finding that "plaintiffs knew or should have known by April, 1982, or no later than May, 1982, that the Union was not going to take any action" and that the complaint "was filed on December 3, 1982." App., C7, ¶ 9. On appeal, the Ninth Circuit affirmed, holding that "Plaintiffs' cause of action was filed on December 3, 1982" and that the claim was, therefore, untimely as "the district court correctly found that all plaintiffs knew or should have known, on *or before* June 3, 1982, that no union action was forthcoming." (emphasis added). App., E6, 802 F.2d at 1191-92 (Kennedy, Beezer and Hall, JJ.). By footnote, the Court of Appeals rejected plaintiffs' efforts to rely upon the mistaken and unauthorized attempt to file a complaint on November 10, 1982, which was received and returned and never served. Citing *Gallon v. Levin Metal Corp.*, 779 F.2d 1439 (9th Cir. 1986), *later vacated*, 481 U.S. 1009 (1987), the Ninth Circuit noted that cases such as this "must be filed *and served* within the 6-month limitations period." 802 F.2d at 1192 n.2 (emphasis in original).

Plaintiffs' petition for a writ of certiorari requesting that the judgment below be vacated and remanded for

further consideration in light of *West v. Conrail*, 481 U.S. 35 (1987) (holding service within six months of accrual not necessary), was granted. *Lacina v. G-K Trucking*, 483 U.S. 1002 (1987).

After this matter was remanded by the Court of Appeals to the district court, the district judge recalendared defendants' motion for summary judgment and invited the parties to submit briefs on the service of process issues noted by the Ninth Circuit in its own remand and to inform the court of the date that the original complaint was filed and served. On the record presented, the district court again found the matter was untimely, rejecting plaintiffs' attempt to rely upon plaintiff counsel's law clerk's unauthorized and inadvertent attempt to submit a complaint on November 10, 1982, which was rejected and returned by the clerk for failure to comply with certain local court rules.[1] App., B3. Having found and concluded that December 3, 1982 remained the date that the statute of limitations was tolled by effective, intentional filing of a complaint, the district court found that the claims were untimely as they had accrued outside the six-month limitations period. The district court reaffirmed the continuing validity of its 1985 Findings And Conclusions (previously quoted) by the statement in its post-remand, 1988 Findings And Conclusions that such "statement supplements the finding of fact and conclusions of law issued by this

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[1] The court also found that the November 10, 1982 complaint was never served on defendants (App., B3) and that plaintiffs did not even assert until February 7, 1985 that that inadvertent effort should be considered with respect to the statute of limitations issue. App., B3. Further, the district court alternatively found that even if the November 10 effort was construed to be a filing, plaintiffs' failure to serve it mandated dismissal under both Rule 4(j), Fed. R. Civ. P. (effective February 26, 1983) and Rule 4 as it existed prior to the adoption of provision 4(j). App., B4-B5.

Court on February 25, 1988." App., B2. The district court had no occasion to be more precise as to how far in advance of June 3, 1982, the claim had accrued given its finding that filing was effective December 3, 1982.

On appeal again to the Court of Appeals for the Ninth Circuit, a wholly different panel (Schroeder, Fletcher and Trott, JJ.) reversed. Expressing a desire "to prevent formal requirements in local rules from becoming jurisdictional barriers to the filing of complaints" (877 F.2d at 742), the Court of Appeals held that the unintentional, inadvertent November 10 filing "should be regarded as having been constructively filed," relying on two prior precedents, *Loya v. Desert Sands Unified School Dist.*, 721 F.2d 1392 (9th Cir. 1983), and *Cintron v. Union Pacific Railroad Co.*, 813 F.2d 917 (9th Cir. 1987). The decision said not a word about the plaintiffs' admission that the whole November 10 exercise was mistaken and unintentional. Instead, the 1989 panel recast the prior panel's footnote dictum that service within six months was necessary as the holding of the original panel so that the later panel could distance itself from the prior panel's simple and direct holding that "Plaintiffs' cause of action was filed December 3, 1982." 802 F.2d at 1192.[2]

Most troubling, once the Court of Appeals moved back the effective commencement date by over three weeks, it paid no heed to the district court's "no later

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[2] The Court of Appeals overturned without explanation the district judge's legal conclusion that the failure ever to serve the November 10 filing justified dismissal under both Rule 4(j) and its predecessor, stating only that defendants "were served within a reasonable period after November 10, and hence suffered no prejudice as a result of the lapse of time between November 10 and December 3." 877 F.2d at 743.

than" findings as to accrual. Instead it arbitrarily purported to decide unequivocably that all claims were now timely, rather than remanding back to the district court for more precise factual findings as to accrual consistent with the "no later than" findings already made. For this reason, petitioners herein, as appellees below, moved for reconsideration, but the Court of Appeals merely amended its decision to buttress its *sub silentio* reversal of the district court's contrary findings, particularly by rewriting the last sentence in footnote 2 to place total reliance for accrual on the date "that the union formally took the position that it would not oppose the closing" (877 F.2d at 743 n.2), even though this was a month after actual closing and inconsistent with the findings below as to accrual. The Court of Appeals gave no reasons for reversing the lower court's findings, and it ignored the request of petitioners herein that the matter be remanded to the district court for further findings as to the precise date of accrual.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Courts Of Appeal Regarding Accrual Of "Hybrid" Fair Representation/Breach Of Contract Claims.

The Ninth Circuit silently ignored the district court's contrary findings as to accrual when it adopted the formal notification rule as its basis for holding all claims now to be timely. Whereas the district court had found that "as of April, 1982, most, if not all, of the plaintiffs believed that the Union was not going to take any

action," and that "as of mid-May 1982, all of the drivers knew or should have known that the Union was not going to take any action" (App., B2 and C4), the Court of Appeals, in its amended footnote 2 justified its unequivocal, no-earlier-than-May 17 accrual date on the grounds that it was not until then "that the Union formally took the position that it would not oppose the closing."

The Ninth Circuit's insistence on awaiting until some formal notice has been given before the cause of action accrues, in the face of prior, actual knowledge by the employee, is inconsistent with decisions of several other circuits, most particularly, the Court of Appeals for the Sixth Circuits' better reasoned decision in *Dowty v. Pioneer Rural Electric Co-Operative, Inc.*, 770 F.2d 52 (6th Cir.), *cert. denied*, 474 U.S. 1021 (1985). There, an employee sought to bring action after an arbitration decision was rendered prohibiting him from pursuing separate private business on pain of discharge, but the suit was filed more than six months after he was orally advised of the arbitration panel's adverse decision. Plaintiff had been orally advised of the results July 7, 1981, and actually received his arbitration papers on July 10, 1981; he filed his action January 8, 1982. His effort to rely upon the three-day difference between actual notice and "formal" notice was rejected:

> We are not persuaded by plaintiff's argument that he cannot be deemed to have knowledge until he receives formal notice of the arbitrator's decision and award. Failure of an employee to receive a copy of an arbitration decision does not toll the running of limitations periods in § 301 actions when he knows what the union has done to represent his interests and essentially the disposition of his grievance.

770 F.2d at 57.

The Ninth Circuit's "formal notice" rule is also inconsistent with the Court of Appeals for the Eleventh Circuit's decision in *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984). There, as an alternative holding to its holding that service within six months of accrual was required, the court found the plaintiff knew that the Union decided his grievance was without merit no later than October 16, 1981, when he was actually laid off and the fact that he did not receive written notice until October 28, 1981 "is not determinative." 742 F.2d at 614. Accordingly, plaintiff's April 27 filing (which would have been timely if the letter dated October 28 was the accrual date was untimely:

> The plaintiff was orally informed of his grievance's withdrawal no later than October 16 so the date he received formal written notice would not control. The summary judgment could have been based on the ground that the statute of limitations set forth by § 10(b) expired on April 16, 1982, so that plaintiff's April 27 filing was not timely.

Id. The inconsistency of that holding and the ruling in the present case is obvious when one considers the fact that here all plaintiffs were permanently laid off April 16, 1982, some six months and 25 days before the inadvertent November 10 filing now credited by the Court of Appeals as actual commencement of the suit. Since these employees had voted down a new contract negotiated by their Union several weeks before, it is not surprising that the district court found that most, if not all, of the plaintiffs knew at or about the time of actual lay off that the Union would accept closure without a fight.

Yet another case where a Court of Appeals refused to hold a fair representation claim timely when the only

arguable basis to do so was a final, ritualistic act of notification following on the heels of prior, clear indications that no relief for employees would be forthcoming is *Scott v. Local 863, International Brotherhood of Teamsters*, 725 F.2d 226 (3d Cir. 1984). There, a group of laid off employees filed suit October 8, 1982, almost one year after their actual lay off. On February 5, 1982 and again on February 22, 1982 attorneys for the Union advised the employees that no action would be taken on their behalf. This message was reiterated yet again in an April 7, 1982 letter received several days later. 725 F.2d at 229. The district court had applied a three-month statute of limitations as a result of which the claim was clearly untimely under all any of such dates as it did not then have the benefit of this Court's decision in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). As a result, the factual findings were relatively sparse and cryptic regarding employee knowledge of the Union's efforts on their behalf or the lack thereof at or about the six-month limitations date. In language equally applicable to this case, that court held: "It would be inappropriate for an appellate court to attempt to resolve these factual matters in the first instance" and remanded the matter for further proceedings. 725 F.2d at 229.

The instant decision is clearly at variance with the decisions of three other circuits and endorses the wrong standard of the necessities for accrual.

II. The Decision Of The Court of Appeals Incorrectly Decides An Important Issue Of Federal Law.

As the detailed discussion of this case's procedural history in the Statement Of The Case shows, a different panel of the Court of Appeals of the Ninth Circuit used this Court's grant of certiorari to remand specifically for consideration of a timely service-of-process issue as an opportunity to set aside the prior panel's holding that the unauthorized, unsuccessful foray to the clerk's office on November 10 by plaintiffs' counsel's law clerk did not constitute a filing for statute of limitations purposes. 802 F.2d at 1192. Instead, drawing on substantially dissimilar precedents in *Loya v. Desert Sands Unified School Dist.*, 721 F.2d 279 (9th Cir. 1983) (where an otherwise timely and proper complaint was rejected because it was submitted on legal-length paper to a district court which had recently changed to compulsory use of letter-length paper) and *Cintron v. Union Pacific Railroad Co.*, 813 F.2d 917 (9th Cir. 1987) (where a complaint otherwise timely and correct as to form was rejected because two holes had not been punched at the top of the complaint, the check for the required filing fee was higher than required and a civil cover sheet was missing), the Court of Appeals held that these plaintiffs' admittedly unintended, erroneous and unsuccessful submission should be given like treatment. Yet here the district judge had found that for over two years, from December 1982 until February 7, 1985, plaintiffs routinely asserted in pleadings and sworn declarations that the only complaint at issue in this case was the one filed December 3, 1982. Only when it suited their purposes did they belatedly reveal the existence of the received and rejected November 10 document.

For the very reason that they are legal nullities, such "unintended" filings rarely come to light in adversary litigation and, thus, they are not the subject of frequent litigation. There is, however, a serious vice to the proper administration of justice in allowing parties retroactively to transform such filings into legally meaningful documents as the process is open to infinite mischief and gimmicks designed to evade definitive statutes of limitations. It takes no great insight from experience for an attorney to know what formal defects will cause a complaint to be rejected at the filing window, yet the mere existence of some undisclosed complaint with a "received and returned" stamp on it will, under the logic of the Court of Appeals below, allow a plaintiff to move the limitations cut-off date back to some much earlier, more opportune date. Yet defendants, through the most vigorous search possible of court records would never obtain notice of the purported filing. For this very reason, a bright-line rule is needed, particularly for "complaints" which are not corrected and returned to the district court immediately on notice of their rejection. The approach taken by the court below is totally at odds with the basic principles of *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), where a *pro se* plaintiffs' submission of a request for court-appointed counsel during the time allowed to file a complaint was deemed inadequate to preserve her Title VII cause of action as no complaint within the meaning of Rule 8, Fed. R. Civ. P., was filed during this period. As this Court stated:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, 447 U.S.

> 807, 826 (1980), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

466 U.S. at 152.

The vice to the administration of justice of incomplete filings has been recognized by other courts which have had occasion to deal with the issue.[3] The element of *intent* has also been relied upon by courts which have allowed late filed cases to go forward. In *Suarez v. Little Havana Activities*, 721 F.2d 338 (11th Cir. 1983), a terminated employee filed a Title VII sex discrimination suit against her former employer. The plaintiff mailed the complaint and summons to the clerk of court on June 6, 1981. However, the complaint did not arrive until June 10, 1981, two days after the statute of limitations period had expired. *Id.* at 339. The district court dismissed plaintiff's complaint on the basis that the filing was untimely. The Eleventh Circuit reversed, holding that the plaintiff had equitably tolled the statute of limitations, because she reasonably expected delivery of the complaint within 48 hours after its mailing. In applying the equitable remedy, the court found it critical that:

> Suarez's actions showed neither a lack of diligence nor carelessness *or a lack of intent to actually file the complaint. The respondents*

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[3] *See Ward v. Saben Appliance Co.*, 391 So.2d 1030 (Ala. 1980) (complaint tendered to clerk with instructions to withold service not considered sufficient to toll statute of limitations); *Kahn v. Alkek*, 266 S.W.2d 546 (Tex. Civ. App. 1954) (complaint filed on last day before limitations period runs and then withdrawn with request not to issue summons does not toll limitations period).

> *were not surprised by the charges or otherwise prejudiced.*

Id. at 340 (emphasis added).

As the foregoing cases illustrate, not only is a party's intent an important factor to consider in determining if and when a complaint is filed, but the unintentional filing of complaint is not enough to toll the statute of limitations. The Court of Appeals decision in this case stands in stark contrast to such cases and condones a practice which deserves no toehold in the federal courts. Accordingly, a writ should issue.

CONCLUSION

Because the opinion of the Court of Appeals for the Ninth Circuit is in conflict with decisions of other Courts of Appeals regarding accrual of "hybrid" fair representation/breach of contract claims and because the same opinion opens the door to the pernicious practice of allowing inadvertent, undiscoverable, rejected filings to take the place of legitimate complaints, this Petition for certiorari should be granted.

DATED: October 16, 1989

Respectfully submitted,

GIBSON, DUNN & CRUTCHER

DAVID A. CATHCART
WILLIAM F. HIGHBERGER*

Attorneys for Petitioners

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIS LACINA, et al.,
Plaintiffs-Appellants,

v.

G-K TRUCKING, et al.,
Defendants-Appellees.

No. 88-5958

D.C. No.
CV-82-6272-JMI

OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
March 7, 1989—Pasadena, California

Filed April 25, 1989

Before: Mary M. Schroeder, Betty B. Fletcher and Stephen S. Trott, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Courts and Procedure

Reversing and remanding a judgment of dismissal on statute of limitations grounds, the court held that a complaint rejected by the court clerk for nonconformance to a local rule against naming Doe defendants was deemed constructively filed.

Appellant Francis Lacina attempted to file a complaint in the district court, but it was rejected for nonconformance with a local rule against use of fictional Doe defendants in complaint captions. Lacina refiled in proper form 23 days later and promptly served the complaint. The district court found the filing untimely. It was affirmed on appeal because the service had not been effected within the six-month statutory period. The Supreme Court vacated the decision, ruling that service need only be effected within a reasonable time after filing. On remand to the district court, the court held that the date of the first second filing controlled, and dismissed the complaint. Lacina contended that the complaint was constructively filed when rejected by the district court clerk for violation of the local rule.

[1] In order to prevent formal requirements in local rules from becoming barriers to the timing of timely complaints, complaints which are tendered but rejected on the basis of such rules should be regarded as constructively filed.

COUNSEL

Gregory G. Petersen and Larry J. Roberts, Petersen and Trott, Santa Ana, California, for the plaintiffs-appellants.

David A. Cathcart, Gibson, Dunn & Crutcher, Los Angeles, California, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

This procedurally unique case involves repeated attempts by the plaintiff employees to file a timely, yet not premature, complaint against their employer for breach of their collec-

tive bargaining agreement. The case arises against a historical background of unusual uncertainty regarding time requirements in section 301 cases.

This is the second appeal to this court in this case. Our original decision affirmed the district court's dismissal of the case on statute of limitations grounds. *Lacina v. G-K Trucking,* 802 F.2d 1190 (9th Cir. 1986). We did not decide in that appeal whether a timely complaint had been filed because we observed that even if it had been filed, the complaint had not been served within the six-month statute of limitation period as then required by our circuit law. *Lacina v. G-K Trucking,* 802 F.2d at 1192 n.2. The Supreme Court reversed our decision and remanded for reconsideration in light of *West v. Conrail,* 481 U.S. 35 (1987), which held that there is no requirement that a section 301 complaint be served within the six-month statute of limitations period, so long as it is filed within that period and served within a reasonable time after filing. *Lacina v. G-K Trucking,* 107 S. Ct. 3224 (1987).

We in turn remanded to the district court, which once again dismissed the action, this time on the ground that the complaint was not timely filed. Plaintiffs once again appeal. We hold in the unusual circumstances of this now six-year-old litigation that the plaintiffs constructively filed their complaint within the statutory period and are entitled to their day in court. We therefore reverse and remand to the district court for consideration of the merits of their claims.

The unusual circumstances are as follows. Plaintiffs originally attempted to file this action on November 10, 1982. There is now no question that such a filing, had it been accepted, would have been timely. The district court clerk's office, however, returned the complaint because it violated a local rule then in existence prohibiting the use of fictional Doe defendants in complaint captions.

The plaintiffs refiled the complaint, without the offending Doe defendants in the caption, on December 3, 1982. Plain-

tiffs did so after efforts to ensure that they had exhausted all contract remedies with the union and were not filing the complaint prematurely. Service of that complaint was effected promptly. The district court held that the plaintiffs' cause of action accrued in May 1982, and that the December 3 filing was therefore untimely.

In the first appeal, plaintiffs argued, as a fall back position in the event we agreed the cause of action had accrued in May 1982, that we should follow our decision in *Loya v. Desert Sands Unified School Dist.*, 721 F.2d 279, 281 (9th Cir. 1983), and hold that there had been a timely constructive filing of the complaint on November 10. We affirmed the dismissal on the ground that, even if there had been a constructive filing of the complaint on November 10, that filing was irrelevant because the applicable law required both filing and service of a complaint within the six-month period.[1] *Lacina v. G-K Trucking*, 802 F.2d 1190, 1192 n.2 (9th Cir. 1986). In that statement we soon were shown to have been in error, for the Supreme Court shortly thereafter held that service need not be effected within the six-month period, but only within a reasonable time after filing of the complaint in accordance with Fed. R. Civ. P. 4. *West v. Conrail*, 481 U.S. 35 (1987). Upon plaintiffs' petition for certiorari, the Supreme Court therefore vacated our decision and remanded. *Lacina v. G-K Trucking*, 107 S. Ct. 3224 (1987).

[1] On our remand to the district court, the district court agreed with the defendants that the attempt to file a complaint on November 10 should be disregarded because the plaintiffs did not attempt to refile the complaint until December 3, after making inquiries of the union concerning whether grievance remedies had been exhausted. We do not see that as a sound basis for ignoring the November 10 filing, which the

[1]In the earlier appeal we also reversed the district court's imposition of sanctions against plaintiffs' counsel for the plaintiff's reliance on the November 10 filing

district court clerk should not have rejected. We have previously held that in order to prevent formal requirements in local rules from becoming jurisdictional barriers to the filing of timely complaints, complaints which are tendered but rejected on the basis of such rules should be regarded as having been constructively filed. *See Loya v. Desert Sands Unified School Dist.*, 721 F.2d 279, 280-81 (9th Cir. 1983) (complaint was constructively filed although rejected by clerk because typed on the wrong size paper); *United States v. Dae Rim Fishery*, 794 F.2d 1392, 1395 (9th Cir. 1986)(complaint timely filed although rejected for improper form of summons); *Cintron v. Union Pacific Railroad Co.*, 813 F.2d 917, 920-21 (9th Cir. 1987)(complaint timely filed although rejected because filing fee was overpaid).

There is no question that plaintiffs at all times were attempting to file a timely action. The district court clerk's refusal to accept the November 10 filing was based upon no stronger reasons than those we rejected in *Loya*. The defendants received adequate notice of plaintiffs' action because they were served within a reasonable time after November 10, and hence suffered no prejudice as a result of the lapse of time between November 10 and December 3.[2]

Defendants argue that *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), dictates the opposite result, but we do not find *Baldwin* controlling. In *Baldwin*, the Supreme Court held that the filing of an EEOC "right to sue" letter with the district court did not satisfy the requirement that a complaint for discrimination be filed within 90 days. *See* 466 U.S. at 149-50. *Baldwin*, unlike this case, involved a "complaint"

[2]The defendants argue that if they had known about the November 10 complaint they would have changed their discovery strategy and argued differently in the district court about when the cause of action accrued. Yet there is nothing in the record indicating that the statute of limitations could have begun to run before May 17. The conduct which the employees contend constituted a breach of their collective bargaining agreement, the closing of the terminal, did not occur until May 17, 1982.

that failed to meet the standards set forth in the Federal Rules of Civil Procedure, specifically the requirement of Fed. R. Civ. P. 8(a)(2) that the complaint include a statement of the claim. *See* 466 U.S. at 149. This case, in contrast, involves a complaint which complied in all material respects with the Federal Rules.

The judgment of the district court dismissing the action on statute of limitations grounds is REVERSED and the matter REMANDED for further proceedings.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIS LACINA, et al.,
Plaintiffs-Appellants,

v.

G-K TRUCKING, et al.,
Defendants-Appellees.

No. 88-5958
D.C. No. CV-82-6272-JMI

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
March 7, 1989 — Pasadena, California

Filed April 25, 1989
Amended July 17, 1989

Before: Mary M. Schroeder, Betty B. Fletcher and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY
Courts and Procedure

Reversing and remanding a judgment of dismissal on statute of limitations grounds, the court held that a complaint rejected by the court clerk for nonconformance to a local rule against naming Doe defendants was deemed constructively filed.

Appellant Francis Lacina attempted to file a complaint in the district court, but it was rejected for nonconformance with a local rule against use of fictional Doe defendants in complaint captions. Lacina refiled in proper form 23 days later and promptly served the complaint. The district court found the filing untimely. It was affirmed on appeal because the service had not been effected within the six-month statutory period. The Supreme Court vacated the decision, ruling that service need only be effected within a reasonable time after filing. On remand to the district court, the court held that the date of the first second filing controlled, and dismissed the complaint. Lacina contended that the complaint was constructively filed when rejected by the district court clerk for violation of the local rule.

[1] In order to prevent formal requirements in local rules from becoming barriers to the timing of timely complaints, complaints which are tendered but rejected on the basis of such rules should be regarded as constructively filed.

COUNSEL

Gregory G. Petersen and Larry J. Roberts, Petersen and Trott, Santa Ana, California, for the plaintiffs-appellants.
David A. Cathcart, Gibson, Dunn & Crutcher, Los Angeles, California, for the defendants-appellees.

ORDER

The panel as constituted above has voted unanimously to deny the petition for rehearing.

The opinion is to be amended as follows:

The last sentence of footnote 2 should be amended to read:

> "It was not until May 17, 1982, that the union formally took the position that it would not oppose the closing."

The last sentence in the carryover paragraph on page 4282 should be amended to read: "The district court held that the plaintiffs' causes of action accrued no later than mid-May, 1982, and the December 3 filing was therefore untimely."

The petition for rehearing is denied.

OPINION

SCHROEDER, Circuit Judge:

This procedurally unique case involves repeated attempts by the plaintiff employees to file a timely, yet not premature, complaint against their employer for breach of their collective bargaining agreement. The case arises against a historical background of unusual uncertainty regarding time requirements in section 301 cases.

This is the second appeal to this court in this case. Our original decision affirmed the district court's dismissal of the case on statute of limitations grounds. *Lacina v. G-K Trucking*, 802 F.2d 1190 (9th Cir. 1986). We did not decide in that appeal whether a timely complaint had been filed because we observed that even

it if had been filed, the complaint had not been served within the six-month statute of limitation period as then required by our circuit law. *Lacina v. G-K Trucking*, 802 F.2d at 1192 n.2. The Supreme Court reversed our decision and remanded for reconsideration in light of *West v. Conrail*, 481 U.S. 35 (1987), which held that there is no requirement that a section 301 complaint be served within the six-month statute of limitations period, so long as it is filed within that period and served within a reasonable time after filing. *Lacina v. G-K Trucking*, 107 S. Ct. 3224 (1987).

We in turn remanded to the district court, which once again dismissed the action, this time on the ground that the complaint was not timely filed. Plaintiffs once again appeal. We hold in the unusual circumstances of this now six-year-old litigation that the plaintiffs constructively filed their complaint within the statutory period and are entitled to their day in court. We therefore reverse and remand to the district court for consideration of the merits of their claims.

The unusual circumstances are as follows. Plaintiffs originally attempted to file this action on November 10, 1982. There is now no question that such a filing, had it been accepted, would have been timely. The district court clerk's office, however, returned the complaint because it violated a local rule then in existence prohibiting the use of fictional Doe defendants in complaint captions.

The plaintiffs refiled the complaint, without the offending Doe defendants in the caption, on December 3, 1982. Plaintiffs did so after efforts to ensure that they had exhausted all contract remedies with the union and were not filing the complaint prematurely. Service of that complaint was effected promptly. The district court held that the plaintiffs' causes of action accrued no later

than mid-May, 1982, and the December 3 filing was therefore untimely.

In the first appeal, plaintiffs argued, as a fall back position in the event we agreed the cause of action had accrued in May 1982, that we should follow our decision in *Loya v. Desert Sands Unified School Dist.*, 721 F.2d 279, 281 (9th Cir. 1983), and hold that there had been a timely constructive filing of the complaint on November 10. We affirmed the dismissal on the ground that, even if there had been a constructive filing of the complaint on November 10, that filing was irrelevant because the applicable law required both filing and service of a complaint within the six-month period.[1] *Lacina v. G-K Trucking*, 802 F.2d 1190, 1192 n.2 (9th Cir. 1986). In that statement we soon were shown to have been in error, for the Supreme Court shortly thereafter held that service need not be effected within the six-month period, but only within a reasonable time after filing of the complaint in accordance with Fed. R. Civ. P. 4. *West v. Conrail*, 481 U.S. 35 (1987). Upon plaintiffs' petition for certiorari, the Supreme Court therefore vacated our decision and remanded. *Lacina v. G-K Trucking*, 107 S. Ct. 3224 (1987).

[1] On our remand to the district court, the district court agreed with the defendants that the attempt to file a complaint on November 10 should be disregarded because the plaintiffs did not attempt to refile the complaint until December 3, after making inquiries of the union concerning whether grievance remedies had been exhausted. We do not see that as a sound basis for ignoring the November 10 filing, which the district court clerk should not have rejected. We have previously held

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[1] In the earlier appeal we also reversed the district court's imposition of sanctions against plaintiffs' counsel for the plaintiffs' reliance on the November 10 filing.

that in order to prevent formal requirements in local rules from becoming jurisdictional barriers to the filing of timely complaints, complaints which are tendered but rejected on the basis of such rules should be regarded as having been constructively filed. *See Loya v. Desert Sands Unified School Dist.*, 721 F.2d 1392, 1395 (9th Cir. 1986) (complaint timely filed although rejected for improper form of summons); *Cintron v. Union Pacific Railroad Co.*, 813 F.2d 917, 920-21 (9th Cir. 1987) (complaint timely filed although rejected because filing fee was overpaid).

There is no question that plaintiffs at all times were attempting to file a timely action. The district court clerk's refusal to accept the November 10 filing was based upon no stronger reasons than those we rejected in *Loya*. The defendants received adequate notice of plaintiffs' action because they were served within a reasonable time after November 10, and hence suffered no prejudice as a result of the lapse of time between November 10 and December 3.[2]

Defendants argue that *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), dictates the opposite result, but we do not find *Baldwin* controlling. In *Baldwin*, the Supreme Court held that the filing of an EEOC "right to sue" letter with the district court did not satisfy the requirement that a complaint for discrimination be filed within 90 days. *See* 466 U.S. at 149-50. *Baldwin*, unlike this case, involved a "complaint" that failed to meet the standards set forth in the Federal Rules

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[2] The defendants argue that if they had known about the November 10 complaint they would have changed their discovery strategy and argued differently in the district court about when the cause of action accrued. Yet there is nothing in the record indicating that the statute of limitations could have begun to run before May 17. It was not until May 17, 1982, that the union formally took the position that it would not oppose the closing.

of Civil Procedure, specifically the requirement of Fed. R. Civ. P. 8(a)(2) that the complaint include a statement of the claim. *See* 466 U.S. at 149. This case, in contrast, involves a complaint which complied in all material respects with the Federal Rules.

The judgment of the district court dismissing the action on statute of limitations grounds is REVERSED and the matter REMANDED for further proceedings.

APPENDIX B

FILED APRIL 4, 1988
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCIS LACINA, et al.,
Plaintiffs,
v.
GK TRUCKING, et al.,
Defendants.

CASE NO. CV-82 6272 JMI (Bx)

AMENDED SUPPLEMENTAL STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 7.14.2, defendants GK Trucking Corp., GK Technologies Inc., including its division General Cable Company, the Penn Central Corporation and Robert Jensen submit to the Court their amended proposed supplemental statement of uncontroverted facts and conclusions of law with respect to their motion of summary judgment. This supplemental memorandum of points and authorities is in support of its summary judgment motion which was recalendared by the Court in its November 16, 1987 order. This statement supplements the findings of fact and conclusions of law issued by this Court on February 25, 1985.

FINDINGS OF FACT

1. In late 1981, GK Trucking experienced a drop in business, necessitating a layoff of 11 of its drivers.

2. On December 9, 1981, Teamsters Local 224 (the "Union"), on behalf of the laid-off drivers, filed a grievance contending that the layoff was improper under the terms of the applicable collective bargaining agreement. This grievance was heard and denied on November 10, 1982.

3. On or about April 1, 1982, GK Trucking announced to its employees that it was going out of business and closing its Montebello terminal. As of April 16, 1982, the terminal was closed and the employment of all the drivers, including all the plaintiffs herein, was terminated.

4. None of the drivers/plaintiffs filed a grievance with respect to close of the terminal.

5. As of mid-May 1982, all of the drivers knew or should have known that the Union was not going to take any action on their behalf. *Lacina v. GK Trucking*, 802 F.2d 1190, 1192 (9th Cir. 1986).

6. On November 10, 1982, a law clerk employed by plaintiffs' counsel attempted to file a complaint in United States District Court. Said complaint was not accepted for filing by the court clerk because it failed to comply with certain local court rules.

7. When plaintiffs' counsel became aware of this unsuccessful filing effort, he informed the law clerk that she had made a mistake in trying to file the complaint at that time, and that she should not make any further filing efforts until after the completion of the grievance hearing involving GK Trucking and the Union.

8. Plaintiffs made no effort to file a new complaint until December 3, 1982. At that time, plaintiffs filed a complaint which was later served on defendants and which triggered this litigation.

9. Plaintiffs' attempt to file a complaint on November 10, 1982 was a mistake and unintentional.

10. From December, 1982 through February, 1985, it was the position of plaintiffs, as stated in their pleadings and sworn declarations, that the only complaint at issue in this case was the one filed on December 3, 1982.

11. It was not until February 7, 1985 that plaintiffs asserted for the first time that their inadvertent effort to file a complaint on November 10, 1982 should be considered by the Court with respect to statute of limitations issue.

12. The complaint presented for filing by plaintiffs on November 10, 1982 was never served on defendants. That rejected pleading was kept in plaintiffs' files for two years with plaintiffs instead electing to proceed by filing a second complaint on December 3, 1982.

CONCLUSIONS OF LAW

Insofar as there may be mixed questions of fact and law, the following conclusions are also found by the Court to be true in all respects.

1. Plaintiffs' lawsuit under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), is governed by a six-month statute of limitations. *Del Costello v. Teamsters*, 462 U.S. 151 (1983).

2. The statute of limitations in this case expired no later than mid-November, 1982 since plaintiffs knew or should have known of the Union's decision not to take any action on the plaintiffs' behalf no later than mid-May 1982.

3. Under Rule 4(j) of the Federal Rules of Civil Procedure, actions shall be dismissed if service of the complaint and summons is not made within 120 days after the filing of the complaint.

4. Prior to the date on which Federal Rule of Civil Procedure 4(j) became effective (February 26, 1983), service of a summons and complaint was required to be performed by a United States marshall. The time within which service was to be effected was a matter within the court's discretion. *Morse v. Elmira Country Club*, 752 F.2d 35, 39 n.7 (2nd Cir. 1984).

5. Plaintiffs' inadvertent attempt to file a complaint on November 10, 1982 does not constitute a "filing" for purposes of tolling the statute of limitations.

6. Even if the November 10 effort somehow was construed to be a "filing," plaintiffs' failure to serve that complaint mandates dismissal of this action under F.R.C.P. Rule 4(j).

7. Even if the November 10 effort constitutes a "filing," plaintiff's failure to serve that complaint permits the Court to exercise its discretion and dismiss the case under Federal Rule of Civil Procedure 4 as it existed prior to the adoption of provision 4(j).

8. An unintentional, unsuccessful filing of a complaint does not toll the statute of limitations. *Ward v. Saben Appliance Co.*, 391 So. 2d 1030 (Ala. 1980); *Kahn v. Alkek*, 266 S.W. 2d 546 (Tex. Civ. App. 1954).

9. Plaintiffs' unintentional, unsuccessful effort to file a complaint on November 10, 1982 is not sufficient to toll the statute of limitations. In contrast to *Loya v. Desert Sands Unified School District*, 721 F.2d 279 (9th Cir. 1983), and *Cintron v. Union Pacific Railroad Co.*, 813 F.2d 917 (9th Cir. 1987), where the plaintiffs intended to file suit but did not comply with local rules, the plaintiffs herein never intended to file their lawsuit on November 1, 1982.

10. Even in cases where a plaintiff has intended to file suit, courts will not allow the action to go forward if the complaint is filed only a few days late and there is no showing of diligence on the part of the plaintiff. *Baldwin County Welcome Center v. Brown*, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984).

11. There are no genuine issues covering any of the foregoing facts, and all such facts are material.

12. Judgment shall be entered in accordance with the proposed summary judgment submitted herewith.

DATED: April 1, 1988

/s/ James M. Ideman
United States District Judge

Submitted by:

GIBSON, DUNN & CRUTCHER
DAVID A. CATHCART
WILLIAM D. CLASTER

By /s/ William D. Claster
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APPENDIX C

FILED Feb 25 4:25 PM '85
CLERK, U.S. District Court
CENTRAL DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCIS LACINA, et al.,
Plaintiffs,

v.

GK TRUCKING, et al.,
Defendants.

CASE NO. CV 82-6272 JMI

PROPOSED STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Pursuant to Local Rule 7.14.2, Defendants GK Trucking Corp., GK Technologies, Incorporated, including its division General Cable Company, The Penn Central Corporation and Robert Jensen submit to the Court their proposed Statement of Uncontroverted Facts and Conclusions of Law with respect to their Motion for Summary Judgment. Said Defendants contend that there are no genuine issues as to any of the proposed uncontroverted facts, and that all such facts are material.

1. GK Trucking Corp., (hereinafter "GK Trucking") was a contract carrier truck line. GK Trucking is a subsidiary of GK Technologies, Inc., which is a subsidiary of Pennsylvania Company, which in turn is a subsidiary of The Penn Central Corporation. General Cable is a division of GK Technologies, Inc., and was

the largest single customer of GK Trucking. Defendant Robert Jensen was the Chairman of the Board of GK Technologies, Inc.

2. Plaintiffs Francis Lacina, David Galbraith, Bill Knight, George Craig, Ted Edwards, Charles Beeson, Donald Evans, Robert Beck, Lou Resinger, Andrew Rogers, Buck Germany, Dan Kelly, Marvin Gates, Wilburt Bond, William Gonzales, Lester Dixon, Frank Matney and Rick Bernas were truck drivers employed by GK Trucking at its Montebello, California, terminal.

3. In 1979, GK Trucking and The International Brotherhood of Teamsters Union, Local 224 (hereinafter "the Union"), entered into a collective bargaining agreement governing the terms and conditions of employment of GK Trucking's employees (including the plaintiffs) at the Montebello, California, terminal. Said collective bargaining agreement consisted of the National Master Freight Agreement, the Western States Area Over The Road Supplemental Agreement and an August, 1979, rider. When entered into in 1979, this collective bargaining agreement was scheduled to run through June 30, 1982.

4. During late 1980, it became clear to the management of GK Trucking that it needed to reduce the wages being paid to its drivers if it was to remain competitive with other carriers, both union and non-union.

5. On February 9, 1981, after several months of negotiations, GK Trucking and the Union entered into a rider to the collective bargaining agreement covering the 33 drivers then employed at the Montebello terminal. In this rider (known as the "concessions rider") which was approved by the drivers, the Union agreed to various concessions in the existing labor agreement and also agreed to enter into a second rider — the "system 99 rider" — for the purpose of allowing GK Trucking to open a second West Coast terminal for different freight.

6. The system 99 rider was signed by the Union and GK Trucking on July 27, 1981.

7. The 1979-1982 collective bargaining agreement between GK Trucking and the Union contained a mandatory, final and binding grievance and arbitration procedure for disputes that arose under the agreement. Article 8, Section 1, of the National Master Freight Agreement provides in pertinent part as follows:

> "All grievances or questions of interpretation arising under this master agreement or supplemental agreements thereto shall be processed as set forth below.
>
> * * *
>
> (a) All factual grievances or questions of interpretation arising under the provisions of the supplemental agreement (or factual grievances arising under the National Master Agreement) shall be processed in accordance with the grievance procedure of the applicable supplemental agreement."

8. Article 45 of the Western States Area Over The Road Motor Freight Supplemental Agreement sets forth a detailed grievance and arbitration procedure and states: "The decision of the umpire shall be final and binding on all parties and the employee(s) involved."

9. None of the riders negotiated by the Union and GK Trucking modified the grievance or arbitration language contained in either the National Master Freight Agreement or the Western States Area Over The Road Motor Freight Supplemental Agreement.

10. In November of 1981, GK Trucking laid off 10 drivers, 5 of whom are plaintiffs herein, as a result of a reduction in work.

11. In late March, 1982, GK Trucking and the Union negotiated an entirely new labor agreement to replace

the expiring National Master Freight Agreement. It was designed to enable GK Trucking to become more competitive. This agreement was put to a vote by GK Trucking's drivers and was rejected.

12. After the rejection of the new labor agreement, GK Trucking, on or about April 1, 1982, announced to its employees that it was going out of business, closing the Montebello terminal and laying them off permanently.

13. As of April 16, 1982, the Montebello terminal was closed and all of the drivers, including all 18 plaintiffs herein, were laid off permanently.

14. On or about May 17, 1982, the Union and GK Trucking formalized the closure of the Montebello terminal in a change of operations hearing conducted in San Diego, California, pursuant to Article 8, Section 6, of the National Master Freight Agreement.

15. Neither the Union, any plaintiff, nor any other person filed a grievance with respect to the close of the Montebello terminal and the permanent lay-off of the GK Trucking drivers in April, 1982.

16. On or about May 18, 1982, former GK Trucking driver and union steward Walter Bache was informed by Union officials that the Union did not intend to take any action, including the filing of a grievance, to keep the Montebello terminal open.

17. As of April, 1982, most, if not all, of the plaintiffs believed that the Union was not going to take any action, including filing a grievance, regarding the closing of the Montebello terminal and their permanent lay-offs. Further, as of this month, most, if not all, of the plaintiffs believed that the Union was not representing them fairly.

18. All other plaintiffs knew no later than May, 1982, after the change of operations hearing, that the Union

was not going to take any action to keep the Montebello terminal open.

19. All of the plaintiffs knew or should have known by the end of May, 1982, that the Union was not going to take any action, including filing a grievance, regarding the close of the Montebello terminal or their loss of jobs.

20. The proposal to close GK Trucking's Montebello terminal and discontinue operations was made by GK Trucking Vice President Stephen Breckley and GK Technologies, Inc., Vice President Larry Morris.

21. Neither The Penn Central Corporation nor Robert Jensen had any role whatsoever in the negotiation of the collective bargaining agreement or the two 1981 riders.

CONCLUSIONS OF LAW

Insofar as they may be mixed questions of fact and law, the following conclusions are also found by the Court to be true in all respects.

1. This is an action for a breach of a collective bargaining agreement between an employer in an industry affecting commerce and a union representing employees who are working in an industry affecting interstate commerce. The Court has jurisdiction pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185(a).

2. Under federal law, aggrieved employees may not state a claim for relief for breach of a collective bargaining agreement unless they exhaust mandatory, binding, final grievance and arbitration procedures in the agreement. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563, (1976).

3. Employees are relieved of this exhaustion requirement if their union has breached its duty of fair representation toward them in processing their grievances. *Vaca v. Sipes*, 386 U.S. 171 (1967).

4. Because the plaintiffs have not exhausted the grievance and arbitration procedures available to them under the collective bargaining agreement between GK Trucking and the Union, in order to succeed in this Section 301 action, they must first demonstrate that the Union breached its duty of fair representation, and then establish that GK Trucking breached the collective bargaining agreement. *Hines v. Anchor Motor Freight, Inc., supra; United Parcel Service, Inc. v. Mitchell*, 451 U.S.

5. In *DelCostello v. Teamsters*, __ U.S. __, 103 S. Ct. 2281, 76 L. Ed. 476 (1983), the Supreme Court held that a six-month statute of limitation applies to suits brought against an employer and a union for breach of the collective bargaining agreement and breach of duty of fair representation.

6. The six-month statute of limitation applies to cases involving grievances which result in an arbitration award and to cases in which grievances could be filed, but are not. *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1046 (9th Cir. 1983); *Barina v. Gulf Trading & Transp. Co.*, 726 F.2d 560, 561 n.1 (9th Cir. 1984); *Bigbie v. Local 142, International Brotherhood of Teamsters*, 530 F. Supp. 402 (N.D. Ill. 1981).

7. The six-month statute of limitation enunciated by the Supreme Court in *DelCostello* is retroactive in those cases in which that limitation period would lengthen the time to bring suit rather than shorten it. *Barina v. Gulf Trading and Transportation Co.*, 726 F.2d 560, 564, n.8 (9th Cir. 1984). In the case at hand, the statute of limitations in a Section 301 action brought against an employer in California after 1981 but before 1983 was

100 days pursuant to *United Parcel Service, Inc. v. Mitchell, supra*, and Section 1288 of the California Code of Civil Procedure. See *Aragon v. Federated Dept. Stores, Inc.*, __ F.2d __, 85 Daily Journal D.A.R. 229 (9th Cir. 1985)

8. In cases where no grievance is filed, the six-month statute of limitation period begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]." *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962); *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979); *Metz v. Tootsie Roll Industries*, 715 F.2d 299 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984).

9. In the case at hand, all of the plaintiffs knew or should have known by April, 1982, or no later than May, 1982, that the Union was not going to take any action, including the filing of a grievance, to keep the Montebello terminal open or to oppose their permanent lay-offs. Because the complaint in the instant lawsuit was filed on December 3, 1982 — more than six months after the plaintiffs held these beliefs — their Section 301 action against the defendants is barred by the six-month statute of limitations.

10. Plaintiffs' purported second claim for relief, alleging that the termination of their employment was undertaken "for the purpose of discouraging the plaintiffs' membership in a labor organization in violation of Section 7 and 8(a) of the NLRA (National Labor Relations Act)," involves an alleged unfair labor practice under Section 7 and 8 of the NLRA and is therefore preempted by federal labor law. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert.denied*, 439 U.S. 930 (1978); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Plaintiffs' second claim for relief, allegating that their terminations were based on discouraging membership in a labor organization, is therefore subject to dismissal since it is preempted. *Farmer v. Carpenters*, 430 U.S. 290, 305 (1977).

11. All claims against Defendants Penn Central Corporation and Robert Jensen should be dismissed since there is no evidence of their participation in any of the alleged wrongful acts.

12. There are no genuine issues covering any of the foregoing facts, and all such facts are material.

13. Judgment shall be entered in accordance with the proposed summary judgment submitted herewith.

DATED: 25 Feb 85

/s/ James M. Ideman
JAMES M. IDEMAN
United States District Judge

APPENDIX D

FILED APR 4 1988
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Attorneys for Defendants
GK TRUCKING CORP.; GK TECHNOLOGIES, INCORPORATED, including its division GENERAL CABLE COMPANY; THE PENN CENTRAL CORPORATION; and ROBERT JENSEN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCIS LACINA, et al.,
Plaintiffs,
v.
GK TRUCKING, et al.,
Defendants.

CASE NO. CV-2 6272 JMI (Bx)

SUMMARY JUDGMENT
Date: February 29, 1988

Defendants GK Trucking Corp., GK Technologies Inc., including its division General Cable Company, the Penn Central Corporation and Robert Jensen's motion for summary judgment came on for hearing on February 29, 1988 before the court, the Honorable

James M. Ideman, United States District Judge, presiding. The Court having considered all matters in evidence submitted in support of and in opposition to the motion, and the issues having been duly heard and a decision duly rendered and in accordance with the findings of fact and conclusions of law herewith:

IT IS ORDER AND ADJUDGED that defendants GK Trucking Corp., GK Technologies Inc., including its division General Cable Company, The Penn Central Corporation and Robert Jensen's motion for summary judgment be granted, that case No. CV-82-6272 JMI be dismissed as to said defendants, that plaintiffs take nothing by way of their lawsuit and that said defendants be awarded their costs.

DATED: April 1, 1988

/s/ James M. Ideman
United States District Judge

Submitted by:

GIBSON, DUNN & CRUTCHER
DAVID A. CATHCART
WILLIAM D. CLASTER

By: /s/ William D. Claster
William D. Claster

Attorneys for Defendants
GK TRUCKING CORP.; GK TECHNOLOGIES, INCORPORATED, including its division GENERAL CABLE COMPANY; THE PENN CENTRAL CORPORATION; and ROBERT JENSEN

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
DEC 30 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

FRANCIS LACINA, DAVID GALBRAITH,
BILL KNIGHT, GEORGE CRAIG,
TED EDWARDS, CHARLES BEESON,
DONALD EVANS, ROBERT BECK,
LOU RESINGER, ANDREW ROGERS,
BUCK GERMANY, DAN KELLEY,
MARVIN GATES, WILBURT BOND,
WILLIAM GONZALES, LESTER DIXON,
FRANK MATNEY, and RICK BERNAS,
Plaintiffs-Appellants,
and
PETERSEN & FERGUSON,
Appellant,
v.
G-K TRUCKING; GENERAL CABLE;
PEN-CENTRAL CORP.; G-K
TECHNOLOGIES; EASTERN CAARRIERS;
and ROBERT JENSEN,
Defendants-Appellees.

No. 85-5728
D.C. No. CV 82-6272-JMI

AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding
Argued and Submitted May 8, 1986
Pasadena, California
Decided October 21, 1986

Before: KENNEDY, BEEZER, and HALL,
Circuit Judges.

HALL, Circuit Judge:

Plaintiffs-appellants, employees of GK Trucking, appeal from the district court's award of summary judgment in favor of defendant-appellee GK Trucking. Plaintiff's counsel, Petersen & Ferguson, appeals from the imposition of a $1,000 sanction. We affirm the grant of summary judgment and reverse the $1,000 sanction imposed on counsel.

I

Plaintiffs brought this action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (section 301). Plaintiffs claim that GK Trucking violated the terms of the 1979-82 National Master Freight Agreement and two riders to the agreement by closing its Montebello, California terminal. The February 2, 1981 "Concessions Rider" gave GK Trucking the right to maintain a separate terminal which paid lower wages, required GK Trucking to keep the Montebello terminal open, and allowed GK Trucking to provide work through the second terminal only if all Montebello terminal employees were working. The July 27, 1981 "Systems 99 Rider" provided that GK Trucking would not reduce the number of employees at the Montebello terminal absent economic necessity.

In October and November of 1981, GK Trucking laid off eleven employees at the Montebello terminal. The union thereupon filed a grievance on behalf of these employees. In March of 1982, the Montebello terminal employees refused further concessions, and the Montebello facility was closed on April 16, 1982. No grievance regarding the closing of the Montebello terminal was filed. On November 10, 1982, the grievance of the eleven laid-off employees was decided in favor of GK Trucking.

In this action, the district court granted summary judgment in favor of GK Trucking on the basis of the relevant statute of limitations, finding that plaintiffs knew or should have known, on or before June 3, 1982, that the union was not going to proceed with a grievance in regard to the Montebello closing. The district court also imposed a $1,000 sanction on plaintiffs' counsel, finding that he violated Fed. R. Civ. P. 11.

II

We review the district court's grant of summary judgment de novo, *Gallon v. Levin Metals Corp.*, 779 F.2d 1439, 1440 (9th Cir. 1986), and affirm.

The six-month statute of limitations for unfair labor practices contained in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies in section 301 actions. *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169-71 (1983).[1]

---

[1] Petitioners argue that retroactive application of *Del Costello* is unwarranted in this case. But petitioners correctly state that retroactive application of *Del Costello* is proper when it lengthens the period for filing. *See, e.g., Kelley v. International Brotherhood of Elec. Workers*, 803 F.2d 516, 518 (9th Cir. 1986); *Aragon v. Federated Dep't Stores, Inc.*, 750 F.2d 1447, 1451 (9th Cir. 1986);

(continued)

Plaintiffs' cause of action was filed December 3, 1982,[2] so we must determine whether plaintiffs' [claims accrued] on or before June 3, 1982.

A section 301 cause of action for failure to pursue a grievance accrues when the plaintiff knew or should have known that the union was not going to pursue a grievance on his behalf. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986). We agree with the district court's conclusion that, on or before June 3, 1982, as a matter of law, plaintiffs knew or should have known of the union's decision not to pursue a grievance regarding the Montebello terminal closing.

(ftn. continued)
Glover v. United Grocers, Inc., 746 F.2d 1380, 1382 (9th Cir. 1984); *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036, 1040 (9th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984). *See also Acri v. International Assoc. of Machinists & Aerospace Workers District Lodge 115*, 781 F.2d 1393, 1396 (9th Cir. 1986); *McNaughton v. Dillingham Corp.*, 722 F.2d 1459, 1460-62 (9th Cir. 1984) (*McNaughton II*) (denying petition for rehearing). This is precisely what happened in this case: The period *was lengthened*, from 100 days (under state law as mandated by *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981)) to six months. Petitioners arguments against retroactive application of *Del Costello* are thus without merit.

[2] A law clerk for plaintiffs' counsel mistakenly filed a complaint on behalf of plaintiffs on November 10, 1982. The complaint was received and returned by the district court, but never served on defendants. Relying on this court's decision in *Loya v. Desert Sands Unified School District*, 721 F.2d 279, 281 (9th Cir. 1983), plaintiffs argue that the filed and rejected complaint was "filed" for statute of limitation purposes. We have since held, however, that a section 301 action must be filed *and served* within the six-month limitations period. *Gallon v. Levin Metals Corp.*, 779 F.2d 1439, 1440-41 (9th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W 3763 (U.S. May 7, 1986) (No. 85-1839). Because the November 10 complaint was never served, it does not mark the date of the filing of plaintiffs' action for purposes of the statute of limitations.

By letter dated May 17, 1982, the union informed Walter Bache, the union steward for the Montebello terminal, as follows:

> This is in reply to your letter regarding negotiations and closure of the G-K Trucking operation.
>
> This Local Union held two meeting [sic] with the drivers and submitted the Company's final proposal. Both times the proposal was voted down by the drivers.
>
> The Company put in for a change of operations to close down their trucking operation. This was heard and approved by the Change of Operations Committee at the Joint Western Area Committee hearings held in San Diego last week.
>
> We reminded the Company they are still bound by the Agreement until its expiration date, and should any trucking operation be resumed, our contract will apply.
>
> We are very sorry that nothing could be done to save the jobs of our members, but as I stated above, the proposals were voted down, and the Company simply would not reconsider.

Bache testified at his deposition that he contacted some plaintiffs regarding the contents of the May 17 letter, and informed others of the letter when they contacted him. In the context of information available at that time and the lack of union action prior to the letter, the letter was strong evidence that the union was not going to take further action regarding the Montebello terminal closing.

Several plaintiffs testified at depositions that, sometime between the Montebello terminal closing on April 16, 1982 and early in May of 1982, they became aware that the union would not file a grievance on their behalf

in regard to the closing. Others testified that they were not sure whether the union was going to pursue a grievance or not, or that they "believed" the union was not going to take any action.

Under these circumstances, even if some of the plaintiffs lacked actual knowledge that the union was not going to file a grievance over the Montebello terminal closing, the district court correctly found that all plaintiffs knew or should have known, on or before June 3, 1982, that no union action was forthcoming.[3] *See Galindo*, 793 F.2d at 1509. *See also Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 304 (7th Cir. 1983) (considering what reasonably diligent plaintiff would have discovered in determining accrual date), *cert. denied*, 464 U.S. 1070 (1984).

III

Because the facts which caused the district court to impose sanctions are not in dispute, we review the district court's conclusion that plaintiffs' counsel violated Fed. R. Civ. P. 11 de novo, *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986), and reverse.

Rule 11 provides in pertinent part:

> The signature of an attorney [on a pleading, motion, or other paper] . . . constitutes a certificate by him that he has read the pleading,

---

[3] The grievance proceeding concerning the eleven laid-off employees does not affect accrual in this case because that proceeding did not concern the closing of the Montebello terminal. *See Galindo*, 793 F.2d at 1510 n.5. The layoffs at issue took place in October and November of 1981, and the grievance was filed on December 9, 1981. Although the grievance sought "continuing relief," this cannot reasonably be construed to include claims in regard to the closing the Montebello terminal on April 16, 1982.

> motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Subjective bad faith is not an element of a Rule 11 violation, it is enough if the paper at issue lacks a basis in fact or a good faith argument in law, or needlessly increases litigation. *Zaldivar*, 780 F.2d at 830-32.

Plaintiffs' counsel did not violate Rule 11 in filing the February 11, 1985 Supplemental Authority in Opposition to Defendant's Motion for Reconsideration. First, the November 10 filed and rejected complaint, attached as an exhibit to previous papers in opposition to defendants' motion to reconsider, provides the factual basis for counsel's argument. In the Supplemental Authority, plaintiffs' counsel specifically referred to the previous declaration of counsel, the rejected complaint, and their location in the record.

Second, plaintiffs' reliance on *Loya*, 721 F.2d at 281, for the proposition that the rejected November 10 complaint constituted a filing for statute of limitations purposes was then a good faith legal argument. At the time plaintiffs' Supplemental Authority was filed, we had not yet held that a section 301 complaint must be filed and served within the six-month limitations period. *See Gallon*, 779 F.2d at 1440-41.

Third, although the district court was initially confused by the November 10 date in the Supplemental Authority, the matter was cleared up at oral argument. Thus, this is not a case in which a misstatement of fact

has increased the costs of litigation to the opposing party. *See, e.g. In re National Student Marketing Litigation*, 78 F.R.D. 726, 731 & n.13 (D.D.C. 1978), *aff'd sub nom. Lipsig v. National Student Marketing Corp.*, 663 F.2d 178 (D.C. Cir. 1980). Moreover, there is no indication that the Supplemental Authority was filed for an improper purpose.

We therefore affirm the district court's grant of summary judgement in favor of GK Trucking but reverse the district court's imposition of sanctions against plaintiffs' counsel. All parties are to bear their own costs of appeal.

AFFIRMED IN PART, REVERSED IN PART.

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

GK TRUCKING CORP., et al.,
Petitioners,
vs.
FRANCIS L. LACINA, et al.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

GREGORY G. PETERSEN, ESQ.
DANIEL K. OHL, ESQ.
PETERSEN & TROTT
770 The City Drive South
Suite 2100
Orange, California 92668

That affiant makes this service, for WILLIAM F. HIGHBERGER Counsel of Record, GIBSON, DUNN & CRUTCHER Attorneys for Petitioners herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Donald A. Johnson

On October 16, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Notary Public in and for
said county and state